No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

QUESTION PRESENTED FOR REVIEW

Whether during the pendency of a class action, a United States district court can constitutionally enter an order limiting certain communications between plaintiffs or their attorneys and potential or actual class members not yet formal parties to the action, in order to prevent actual and potential abuses of the class action device?

PARTIES BELOW

The following is a listing of all parties to this proceeding, as required by United States Supreme Court Rule 34.1(b):

1. Subsidiaries and Affiliates of Petitioner Gulf Oil Company:*

Afran Bahamas Limited Marine Dept.; Alberta Products Pipe Line Ltd.; Allied-General Nuclear Services; American Heavy Lift Shipping Company; Asia Polymer Corporation; A/S Jargul; A/S Jargul and Co. K/S; Australian Gulf Oil Company; Balinesian Gulf Oil Ltd.; Britama Tankers Limited; Cabinda Gulf Oil Company; China Gulf Plastics Corporation; Canada Systems Group (EST) Limited; Carboquimica, S. A. Ltd.; China Gulf Oil Company, Ltd.; China Gulf Plastics Corporation; Colonial Pipeline Company; Compania Petrolera Aquarico, S.A.; Compagnie D'Investments Pour Les Combustibles De Reacteurs a Haute Temp; Coser, S.A.; Eastern Gulf Oil Company, Ltd.; Eastern Venezuela Gas Transport Company; Ethylene Pijpleiding Maatschappij (Belgium) S.A.; Ethylene Pijpleiding Maatschappij (Nederland) B.V.; Explorer Pipeline Company; Gaelic Oil Co. Ltd.; G & C Realty Limited; General Atomic Company; General Atomic Europe-G.m.b.H.-Zurich; Gulf Canada, Ltd.; Gulf-Dravo Systems Corporation; Gulf Ecuatoriana de Petroleo, S.A.; Gulf Italia Production Co. S.p.A.; Gulf Italiana SpA; Gulf Oil A/S; Gulf Oil (Belgium) S.A.; Gulf Oil Chemicals Company Asia Limited; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Company (Portugal) Limited; Gulf Oil Company South Asia; Gulf Oil Egypt, Ltd.; Gulf Oil (Great Britain) Ltd.; Gulf Oil (Ireland) Ltd.; Gulf Oil (Luxembourg) S.A.; Gulf Oil Pakistan Ltd.; Gulf Oil Refining Ltd.; Gulf Oil Sales, Inc.; Gulf

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* In accordance with United States Supreme Court Rule 28.1, this listing omits wholly-owned subsidiaries which were included in the list of parties submitted in the Petition for writ of certiorari.

Oil (Switzerland); Gulf Oil Trading GmbH; Gulf Oil Trading Investments Limited; Gulf Oil Zaire S.a.R.L.; Gulf Oman Petroleum Ltd.; Gulf-Preload Structures Inc.; Gulf Supply and Distribution Co. Ltd.; Gulf (U.K.) Offshore Investments Limited; Harshaw Cabo & Cia, S.A.; Harshaw Chemie S.a.R.L.; Harshaw Galvanotechnia S.A.; Harshaw Quimics Ltda.; Hochtemperature Reaktorbau G.m.b.H.; Hutchinson Island Limited Partnership; Ico Pintures, S.A.; Industrial Vencedor S.A.; Interquimics S.A.; INSCO Holding and Finance Company N.V.; INSCO Limited; Java Gulf Ltd.; Keydril Ltd.; Keydril (Nigeria) Ltd.; Key International Drilling Co. Limited; Key Perfuracoes Maritimas, Ltd.; Korea Oil Corporation; Kupan Emirates Company Ltd.; Kupan Financial Company (Rotterdam) B.V.-Minerals Branch; Kuwait Oil Company Limited; Laurel Pipe Line Company; London Oil Refining Company Limited; Mid-Atlantic Chemical Corp. S.A.; Midcaribbean Investments Ltd.; Midwest Carbide Corporation; Millmaster Onyx (Canada) Ltd.; Millmaster Onyx G.m.b.H; Montreal Pipe Line Company Limited; Mozambique Gulf Oil Company; Okinawa Sekiyu Company, Ltd.; Okinawa Terminals Co., Ltd.; Oklahoma Nitrogen Company; Panindustrial, S.A.; Peace Pipe Line, Ltd.; Pembroke Cracking Company; Permaping, S.A.; Petroleo Gulf de Brazil Limitada; Petroleos Gulf de Guatemala, S.A.; Plaschem International Company (Hong Kong) Ltd.; Plastigama, S.A.; Productos Quimicos Somox, Ltda.; Project Baltic; Propet Company Ltd.; Raffinerie de Cressier S.A.; Rimbey Pipe Line Co., Limited; Rio Blanco Oil Shale Partnership; Sarni S.p.A.; Silvertown Lubricants Limited; Sociedad Anonima Espanola de Lubrificantes; Societe de Combustible Pour Reacteurs a Haute Temp.; South Pacific Gulf Oil Company; Spanish Gulf Oil Company; Spencer Quimica Mexicana S.A. de C.V.; Sultron Ltd.; Sulzer General Atomic Waermetauscher; Taita Chemical Corporation; Trans Northern Pipe Line Company; Venezuela Gulf Refining Company; West Texas Gulf Pipe Line Company; Western G.M.C. Pontiac Buick Ltd.

2. The Petitioner Unions are:

Oil, Chemical and Atomic Workers International Union, and Local Union No. 4-23 and Oil, Chemical and Atomic Workers International Union, defendants.

The International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers, Local Union No. 390; International Brotherhood of Electrical Workers, AFL-CIO; United Transportation Local Union; International United Transportation Union; Bricklayers, Masons, and Plasterers International Union, Local 13; and International Bricklayers, Masons, and Plasterers Union were prospective defendants named in plaintiffs' (now Respondents') motion to join additional defendants and for leave to amend the complaint. This motion was pending when the district court granted summary judgment for the existing defendants (now Petitioners).

3. Respondents are:

Wesley P. Bernard; Elton Hayes, Sr.; Rodney Tizeno; Hence Brown, Jr.; Willie Whitley and Willie Johnson; the proposed class of all black employees now employed or formerly employed by defendant, Gulf Oil Company, in Port Arthur, Texas, and all black applicants for employment at Gulf Oil Company who have been rejected for employment at the company.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc* (J.A. 231) is reported at 619 F.2d 459. The order of the court of appeals granting a rehearing *en banc* (J.A. 229) is reported at 604 F.2d 449. The vacated panel opinion of the court of appeals, of which parts I, II, and III are adopted by the *en banc* opinion (J.A. 175) is

reported at 596 F.2d 1249. The order of the district court granting Defendants' Motion for Summary Judgment (J.A. 170) is not reported.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on June 19, 1980. The Petition for Writ of Certiorari was filed on September 17, 1980, and was granted on December 8, 1980. (J.A. 279). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The first amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

Fed. R. Civ. P. 23(d) provides:

> (d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene

and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

STATEMENT OF THE CASE

This class action was commenced on May 18, 1976, against Petitioners Gulf Oil Company and the unions[1] by six present or retired black employees of Gulf's Port Arthur, Texas refinery. (R. 1). The suit alleged that Petitioners had engaged in racial discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. (J.A. 11). The Respondents sought to represent a class of all black employees presently and formerly employed at the Port Arthur refinery, and all black applicants who had been rejected for employment at any Gulf facility, without regard to temporal or geographic limits. (J.A. 12).

In 1967, three of the Respondents had filed charges of discrimination against Petitioners with the Equal Employment Opportunity Commission (EEOC) for which the EEOC found reasonable cause on August 15, 1967. (R. 212, 228, 231, 234, 238). At the same time the individual charges of discrimination were pending, concilia-

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1. The union Petitioners are the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and the Oil, Chemical and Atomic Workers International Union.

tion discussions were being conducted between Gulf, the EEOC, and the Office for Equal Opportunity, United States Department of Interior (OEO) (J.A. 73, 78) pursuant to a charge of discrimination filed by a Commissioner of the EEOC in 1968. (J.A. 54). These negotiations between Gulf, the EEOC, and the OEO regarding the Commissioner's charge took place over a period of several years (J.A. 73, 78) and resulted in a conciliation agreement between the EEOC, the OEO, and Gulf on April 14, 1976. (J.A. 26). The agreement established "goals and timetables" for specific affirmative action relief (J.A. 32-38), as well as providing an award of over $900,000 to 616 present and former black employees, and 29 female employees at Gulf's Port Arthur refinery. (J.A. 28, 48). In sworn affidavits the District Director of the EEOC and the Western Regional Manager of the OEO stated the conciliation agreement was a fair and reasonable settlement of all pending charges of discrimination. (J.A. 75, 78).

After the conciliation agreement was finalized, Gulf, pursuant to terms of the agreement, mailed a letter and release, the form of which was approved by the federal agencies, notifying all employees covered by the conciliation agreement that they were entitled to an award of back pay, and that upon execution of the general release, the employees would receive the back pay award. (J.A. 31, 74). At the time this action was filed, approximately 431 black employees out of a total of 616 black employees entitled to a back pay award had executed the receipt and general release, and had received their back pay checks. (J.A. 74). On May 25, 1976, after being served with the complaint, (R. 11) Gulf voluntarily ceased further distribution of the back pay awards and ceased

all contacts with potential class members concerning the conciliation agreement. (J.A. 43, 74, 75).

On May 22, 1976, four days after this action was filed, attorneys for Respondents attended a meeting of actual and potential class members (J.A. 115, 118), and according to affidavits filed in this case, discussed with the potential class members the issues involved in this action, answered questions from the audience, and explained the administrative and legal problems inherent in fair employment litigation. (J.A. 115, 116, 118).

After the meeting, Gulf's counsel, by emergency motion, represented to the district court that it had learned that an attorney for Respondents advised the participants at the meeting to mail back the checks they had received from Gulf, since by prosecuting the present action Respondents' attorney could recover at least double the amount which was paid under the conciliation agreement. (J.A. 22, 23, 24). Gulf's emergency motion sought an interim order limiting communications between potential class members and all parties and their counsel to this lawsuit. (J.A. 21, 25). On May 28, 1976, District Judge Steger, ruling in Chief Judge Fisher's absence, granted Gulf's motion and entered the interim order. (J.A. 44).

Judge Steger's interim order required Gulf to file another motion upon Judge Fisher's return. (J.A. 45). Gulf filed a motion to modify Judge Steger's interim order limiting communications on June 8, 1976. (J.A. 46). After submission of briefs accompanied by five affidavits (J.A. 71, 76, 111, 115, 118) and after a hearing (J.A. 1, 3), Judge Fisher entered a modified order (J.A. 124) which allowed constitutionally protected communications. (J.A. 125). The modified order was adopted almost verbatim

from "Sample Pre-trial Order No. 15—Prevention of Potential Abuses of Class Actions" contained in the *Manual for Complex Litigation*, 1 (Pt. 2) J. Moore, Federal Practice Pt. II, § 1.41 (2d ed. 1980). (J.A. 97). Also, the order allowed a resumption of the conciliation process under the court's supervision. (J.A. 125-129).

On July 6, 1976, Respondents and their attorneys moved for permission to communicate with members of the proposed class (J.A. 130), tendering to the court the substance of the communication in the form of a leaflet. (J.A. 132). This motion was denied by the court on August 10, 1976. (J.A. 157).

After the district court granted summary judgment for the defendants on January 11, 1977, (J.A. 170), Respondents appealed to the United States Court of Appeals for the Fifth Circuit. (R. 392). On June 15, 1979, a panel of the court reversed the judgment of the district court and remanded for further proceedings. (J.A. 175). The panel held that neither the statute of limitations nor the equitable doctrine of laches barred Respondents' claims. However, the panel did uphold the order limiting communications with members of the putative class as a permissible exercise of the district court's discretionary authority to control class actions under Rule 23(d) of the Federal Rules of Civil Procedure. Upon hearing *en banc,* the Fifth Circuit adopted all parts of the panel decision, but reversed the panel's approval of the order affecting communications, holding it was unconstitutional. (J.A. 231).

This Court granted the writ of certiorari on December 8, 1980, expressly limiting review to the district court's

order respecting communications with potential class members.[2] (J.A. 279).

SUMMARY OF ARGUMENT

I.

ENTRY OF THE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S AUTHORITY UNDER RULE 23

A. Class actions are a special kind of litigation where the court must protect the interests of absent class members.

This case raises substantial and important questions concerning the district court's authority under Fed. R. Civ. P. 23 to manage a class action case and to provide for the protection of absent class members. In this case, the Court has limited its review to a class action procedural issue which will require the Court to balance the needs of the district court to manage class actions against the needs of Respondents and their attorneys to communicate with potential members of a proposed class, absent court supervision.

Class actions are a special kind of litigation where the district court is required to protect the interests of absent class members while actively managing class proceedings. Rule 23(d) provides the district court, as guardian of absentees' rights, with broad authority to fashion appropriate orders to prevent abuses of the class action device.

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2. The petition for writ of certiorari also raised the issues of laches and statute of limitations.

B. An order monitoring communications will insure protection of absent class members.

This Court has ruled that in class action cases it is the primary responsibility of the district court to monitor the actions of the parties before it. The most widely accepted order for fairly and equitably monitoring the activity of parties and their attorneys is that proposed by the Board of Editors of the Federal Judicial Center.

The *Manual's* order, while designed to control some communications, freely allows: 1) constitutionally protected communications with absent class members; 2) all communications approved by the court; 3) communications between an attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed, or proposed to employ the attorney; or 4) communications occurring in the regular course of business or in the performance of the duties of a public office or agency . . . which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

The order recommended in the *Manual* is the product of the combined experience of the judges comprising the Board of Editors, who recognized the impossibility of drafting an order which would cover every potential abuse. Consequently, the *Manual's* order is drawn as narrowly as possible to accomplish its intended purposes and represents the best possible monitoring device available to protect absent class members from misrepresentations during class action litigation.

C. The monitoring order entered here is appropriate.

The *Manual's* order was entered in this case only after the district court reviewed a complete record showing the threat of actual abuse to the class action process. The threatened abuses in this case occurred during the pre-class certification stage—the recognized stress point in this special litigation. More importantly, the threatened abuses occurred at a time when the rights of unrepresented absentees were particularly exposed to misrepresentations —during an ongoing conciliation process when absent class members were making important choices concerning their rights. As a result of the threatened abuses, the district court was required to enter a monitoring order to assure effective management of the proposed class and to protect the rights of the potential class members who had already begun to feel the pressures of competing interests for their favor.

II.

THE ORDER OF THE DISTRICT COURT MONITORING COMMUNICATIONS WITH POTENTIAL CLASS MEMBERS IS CONSTITUTIONAL

A. First amendment values must be reconciled with the court's duty to protect the fair and efficient administration of justice.

This Court has often been required to reconcile first amendment rights with other important constitutional interests. When the countervailing value to be reconciled has been the maintenance of a judicial system responsive to the needs of a free society, and to the protection of

the fair and efficient administration of justice, this Court and other American tribunals have traditionally regarded that value to be very important. Here, the competing values are: 1) the court's authority to enter an order, recommended by some of the nation's most experienced jurists and designed to protect against specific abuses during the administration of a unique judicial process; and 2) the generalized first amendment concerns of parties and their counsel, who have submitted to the court's jurisdiction.

The object of the order entered here was to permit the district court to manage this litigation at a particular stress point and to ensure that misleading information did not pass from parties and their attorneys to others directly affected by the litigation, who depend upon the district court for their protection. This Court has recognized there is an important governmental need in preventing misleading speech in the commercial area. In this case, the need to prevent misleading speech is at least as important when the communication originates, in a very real sense, in the district court itself, particularly when those desiring to communicate are, at least to some degree, doing so as officers of the court. The district court had a legitimate constitutionally based concern in ensuring that this class action was conducted in a manner which not only avoided injustice but the appearance of injustice.

B. The order is not a prior restraint.

When reconciling competing constitutional values this Court has required a careful analysis of the various interests involved. The result of this analysis here is that the order did not constitute a prior restraint since it contained a broad "exception" allowing free exercise of

speech without prior court approval. This "exception" allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with violation of the order and for that reason the inquiry into the order's validity cannot proceed on the basis of its assumed constitutional infirmity as a prior restraint.

C. The facts in this case support entry of the order based upon previously articulated standards.

Several standards have been articulated by which to judge the constitutionality of the present order. The Board of Editors of the *Manual* have taken the position that the very nature of the unique class action device creates sufficient justification for entry of the order. Some courts have required a showing of "reasonable probability" of prejudice to the fair administration of justice, while other courts have required a showing of "serious and imminent" danger before entering the order. The facts in this case established threats of abuse to the class action device sufficient to justify entry of the order based upon any of the standards articulated.

The very nature and intensity of the competing forces which occurred at the unusually delicate stage of this litigation demanded entry of the order. These forces, in fact, threatened the rights of absent parties and challenged the class management ability of the district court. As guardian of the absentees' rights and as administrator of the unique class action process, the district court fulfilled its duty to actively monitor the actions of the parties—a duty imposed by the decisions of this Court.

ARGUMENT

INTRODUCTION

This case raises substantial and important questions concerning the administration of class actions in the federal courts and the power of district courts to prevent actual and potential abuses of the class action device under Rule 23 of the Federal Rules of Civil Procedure. In this case, the Court has limited its review to a class action procedural issue which will require the Court to balance the needs of the district court to manage the class action against the needs of Respondents and their attorneys to communicate with potential members of a proposed class, absent court approval.

The issues raised here have not yet been passed upon by this Court. In this case, the United States Court of Appeals for the Fifth Circuit invalidated a district court's order which provided for minimal court supervision of communications with potential class members. The district court entered the order only after compiling a complete record showing the class action device was threatened by abuse.

Since the district court's order was based directly upon the proposed order recommended by the *Manual for Complex Litigation*,[1] the Fifth Circuit's opinion places a constitutional cloud on the work of the Board of Editors of the Federal Judicial Center. Moreover, since the

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1. *Manuel for Complex Litigation, reprinted in* 1 (Pt. 2) J. MOORE FEDERAL PRACTICE Pt. II, § 1.41 (2d ed. 1980) [hereinafter cited as *Manual*]. The *Manual* also recommends adoption by the district courts of a local rule regarding communications with absent class members. *See* n.7, p. 17, *infra*.

Manual's suggested rule and order have been adopted by numerous district courts across the nation, the Fifth Circuit's decision has implications and importance which reach far beyond the facts of this case.[2] Furthermore, the language of the Fifth Circuit's opinion is in conflict with a decision of the United States Court of Appeals for the Second Circuit in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972).

The order has been challenged on both constitutional and statutory grounds. Since this Court will not decide constitutional issues where a nonconstitutional ground will be dispositive, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271-72 (1977); *Hagans v. Lavine*, 415 U.S. 528, 547 n.12, 549 (1974), this brief will first discuss the appropriateness of the district court's order under Rule 23, and then discuss the constitutionality of that order.[3]

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2. The *Manual's* Suggested Local Rule No. 7 has been adopted by: S.D. Fla. R. 19B; N.D. Fla. R. 17B; N.D. Ill. (Civ.) R. 22; E.D. La. R. 2.12; D. Md. R. 20; S.D. Ohio R. 3.9.4; W.D. Pa. R. 34; N.D. Tx. (unpublished); S.D. Tx. R. 6; W.D. Wash. (Civ.) R. 23(g); N.D. Ga. R. 221.2 and 221.3; M.D.N.C. R. 17(b)(6). Based upon the Fifth Circuit's *en banc* decision in *Bernard* the following courts have withdrawn their local rule: S.D. Tx. R. 6; N.D. Fla. R. 17B; N.D. Ill. R. 22.

3. This Court followed a similar method of analysis in *United States v. Nixon*, 418 U.S. 683 (1974), when it discussed the requirements of Fed. R. Crim. P. 17(c) before considering the constitutional questions.

I.

ENTRY OF THE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S AUTHORITY UNDER RULE 23

A. Class actions are a special kind of litigation where the court must protect the interests of absent class members.

This Court has recognized "[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978). Many of the special rules governing this unique litigation are contained expressly in Rule 23 and relate to the district court's authority to manage the class action. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). Thus, under Rule 23(d) the district court is granted broad authority to enter appropriate orders:

> . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . (3) imposing conditions on the representative parties . . . (5) dealing with similar procedural matters.

Fed. R. Civ. P. 23(d).[4]

Recently, this Court said it was obvious "[t]hat there is a potential for misuse of the class action mechanisms.

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4. The district court is required to manage the settlement of class action cases since Fed. R. Civ. P. 23(e) provides that a class action will not be dismissed or compromised without the approval of the court and notice to members of the class in such a manner as the court decides.

. . ." *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper,* 445 U.S. 326, 339 (1980). A review of the case law indicates that the "potential for misuse" has often matured into actual abuse of the class action device resulting in harmful effects on the rights of potential class members.[5]

The class management provisions of Rule 23(d) provide the court with "wide discretion" to create "several methods of safeguarding the interests of absent class members," 3B J. Moore Federal Practice ¶ 23.70, at 23-479, 23-480 (2d ed. 1980), and are applicable to cases, such as this one, brought under Fed. R. Civ. P. 23(b)(2). *Sperry Rand Corp. v. Larson,* 554 F.2d 868 (8th Cir. 1977); *Sanders v. John Nuveen & Co.,* 463 F.2d 1075

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5. These abuses include: calling meetings of actual or potential class members and making misrepresentations, *Reed v. Sisters of Charity of the Incarnate Word of Louisiana, Inc.,* 25 Fed. R. Serv. 2d 331 (W.D. La. 1978); *N.O.W. v. Minnesota Mining and Manufacturing Co.,* 18 Fair Empl. Prac. Cas. 1176 (D. Minn. 1977), *appeal dismissed,* 578 F.2d 1384 (8th Cir. 1978); efforts to seek out people willing to have a class action instituted in their names as representatives of a class, *Carlisle v. LTV Electrosystems, Inc.,* 54 F.R.D. 237 (N.D. Tex. 1972); informal efforts to secure affidavits from members of the class which plaintiffs purported to represent, denying that the plaintiffs represented the affiants, *Northern Acceptance Trust 1065 v. AMFAC, Inc.,* 51 F.R.D. 487 (D. Hawaii 1971); placing unauthorized newspaper advertisements which had an adverse effect on parties, *EEOC v. Red Arrow Corp.,* 8 Fair Empl. Prac. Cas. 621 (E.D. Mo. 1974); seeking to dismiss a class action allegation upon plaintiff's individual compromise, *Rothman v. Gould,* 52 F.R.D. 494 (S.D. N.Y. 1971); conditioning franchise renewal on release of class claims, *Hawkins v. Holiday Inns, Inc.,* [1978-1] Trade Cases ¶ 61,838 (W.D. Tenn. 1978); misleading an emergency judge into striking class allegations which resulted in possible prejudice to the rights of proposed class members, *Yaffe v. Detroit Steel Corp.,* 50 F.R.D. 481 (N.D. Ill. 1970); attempting solicitation of potential class members after denial of class motion, *Weisman v. Darneille,* 78 F.R.D. 671 (S.D. N.Y. 1978).

(7th Cir.), *cert. denied,* 490 U.S. 1009 (1972); *Cranston v. Freeman,* 290 F.Supp. 785 (D.N.Y. 1968), *rev'd on other grounds sub nom. Cranston v. Hardin,* 428 F.2d 822 (2d Cir. 1970), *cert. denied,* 401 U.S. 949 (1971).[6] Under the provisions of Rule 23(d), the district court must actively protect absent class members since "[t]he judge is no longer [to be] a passive observer, allowing the initiative of the opposing attorneys to control the course of the litigation; he plays an active role. In a very real sense, he is the guardian of the interests of absentees." Comment, *Adequate Representation, Notice and the New Class Actions Rule: Effectuating Remedies Provided by the Securities Law,* 116 U. Pa. L. Rev. 889, 898 (1968), *quoted in* 3B J. Moore, *supra,* ¶ 23.70 at 23-480. In addition, the court's direct participation is required in class proceedings since it is "manager of the case." *In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006, 1012 n.8 (5th Cir. 1977); *see also Huff v. N. D. Cass Co.,* 485 F.2d 710, 713 (5th Cir. 1973).

Thus, under Rule 23(d)(1)-(4) the court, as manager of the litigation, is required to enter appropriate orders for the protection of absent class members. The scope of these orders is "limited only by the use of sound judicial discretion," 3B J. Moore, *supra,* ¶ 23.75 at 23-492, and may be framed under Rule 23(d)(5) to correct procedural matters which may adversely affect the rights of absent class members. Consequently, when the rights of absentees are left unprotected by the class action mechanism, the district court, as manager of the class, is required to frame appropriate orders to protect those rights.

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6. Class action claims under Title VII are Fed.R.Civ.P. 23(b)(2) actions. *See Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969); *Jenkins v. United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968).

B. An order monitoring communications will insure protection of absent class members.

Just last term this Court ruled it is a primary "responsibilit[y] of a district court to protect both the absent class and the integrity of the judicial process by monitoring the action of the parties before it." *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper, supra,* at 331. To meet this responsibility, Rule 23(d) authorizes the district court to enter an order protecting absent class members by monitoring information flowing to them. 3B J. Moore, *supra,* ¶ 23.75, at 23-499. The most widely accepted order for fairly and equitably monitoring the activity of class parties is that proposed by the Board of Editors of the Federal Judicial Center.[7] *See Manual, supra,* at 225-228 for a text of the suggested order.[8]

The *Manual's* order while designed to control some communications freely allows: (1) constitutionally protected communications with absent class members; (2) all communications approved by the court; (3) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (4) communications occurring

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7. The judges comprising the Board, after many years of judicial experience with class actions, were especially attuned to the abuse, both intentional and inadvertent, inherent in the class action device. To avoid the potential for abuse and to guard against unapproved conduct of the attorneys or parties, the *Manual* recommended adoption by the district courts of a local rule. *See Manual, supra,* at 32.

8. The recommendations of the *Manual,* although not obligatory upon the courts, are important since "[t]he *Manual* is a collection of suggested procedures for the handling of complex cases written by judges for judges after receiving the widest possible range of suggestions and criticisms from the Bench and Bar." *Manual, supra,* at xxvi.

in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein. *Id.*

The order is the product of the combined experience of the judges comprising the Board of Editors, who recognized the impossibility of drafting an order which would cover every potential abuse.[9] Consequently, the *Manual's* order is drawn as narrowly as possible to accomplish its intended purposes and represents the best possible monitoring device available to protect absent class members from misrepresentations during class action litigation.[10] The *Manual* recommends that the district court not wait until actual abuses occur, but act promptly to prevent potential abuses by entry of the order in all class actions. *Id.* at 226.[11]

Protection of absent class member's rights prior to class certification is particularly important and demands

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9. The district court should not be required to match specific abuses with specific regulatory rules, *see Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 791 (E.D. La. 1977), since any attempt at prohibiting by itemizing each potential abuse would succumb to the ingenuity of those determined to wrongfully take advantage of the class action procedure. *See Manual, supra,* p. 3 (Cumm. Supp. 1980-81).

10. One of the primary purposes of the *Manual's* order is "to prevent misrepresentations of the status, purposes, and effects of the action." *Lupia v. Stella D'Oro Biscuit Co.*, [1974-1] Trade Cases ¶ 75,046 (N.D. Ill. 1972), *appeal dismissed,* (7th Cir. 1973), *cert. denied,* 417 U.S. 930 (1974).

11. "Further experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it. . . ." *Manual, supra,* p. 3 (Cumm. Supp. 1980-81).

the special attention of the trial judge. It is at this stage that the rights of absent class members are acutely exposed to the effects of false or misleading information; a time when they are unrepresented by counsel. *See Winfield v. St. Joe Paper Co.*, 20 Fair Empl. Prac. Cas. 1093 (N.D. Fla. 1977).[12]

The ability to control misleading statements at the pre-certification stage takes on an even greater significance, as in this case, where potential class members were considering accepting a back pay offer in a conciliation agreement making them ineligible for inclusion in the class. Misrepresentations received by this group during their deliberations could have had irreparable consequences.[13]

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12. In the class action context, it appears that the attorney-client relationship between counsel for the namd plaintiffs and purported class members is created when the court certifies the class and designates the class representative and his counsel. *Rental Car of New Hampshire, Inc. v. Westinghouse Electric Corp.*, 496 F. Supp. 373, 383 (D. Mass. 1980); *Amos v. Board of School Directors of the City of Milwaukee*, 408 F. Supp. 765, 774 (E.D. Wis. 1976), *aff'd sub nom. Armstrong v. Brennen*, 359 F.2d 625 (7th Cir. 1976), *vacated*, 433 U.S. 627 (1977). "The relationship between the representative parties and their lawyer or lawyers is one of private contract; the relationship between the class counsel and the members of the class, apart from the representative parties, is one of court creation." *Id.*, at 775. The mere filing of a class action lawsuit does not mean that counsel for the named plaintiffs is counsel for the class; rather that relationship is a matter of judicial determination at the class certification stage. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). Until the court designates an attorney as counsel for the class upon class certification, the absent class members are not represented by counsel and must look to the court to be the "guardian" of their rights. *See Smith v. Josten's American Yearbook*, 78 F.R.D. 154, 168 (D. Kan. 1978), *aff'd*, 624 F.2d 125 (10th Cir. 1980). In this case there was no attorney-client relationship between counsel for the named plaintiffs and the proposed class because no class had been certified.

13. "When those communications are sent during the limited period in which class members may opt out of the class, or as here,

The dangers inherent in exposing absent class members to misrepresentations were explained in *N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1178-1179:

> . . . [T]he court is convinced that it retains a compelling interest in prohibiting unapproved communications to class members if those communications were to misrepresent the status or effect of the case presently before the court. Such misrepresentations would have an obvious potential for creating confusion and for adversely affecting the administration of justice. If such communications were to be cloaked with an air of governmental authority, the potential for confusion would be increased, and there would arise not only the risk of subsequent disenchantment with the judicial process, but also the danger that individuals would be induced to act to their detriment in reliance upon such misinformation.

Thus, the authority of the district court to manage the class must be maintained to prevent misrepresentations during the pre-class certification stage of the litigation.

If the *Manual's* suggested order is ignored and unsupervised communications with potential class members are allowed, parties and their attorneys will be able to send out notices inconsistent with those from the court, thereby usurping the exclusive authority of the trial court to issue or approve notices to the class:

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in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable." *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1260 (5th Cir. 1979), *rev'd in part,* 619 F.2d 459 (5th Cir. 1980) (*en banc*).

> There is no provision in the Federal Rules for counsels for a party, sua sponte, to notify class members or non-class members, formally or informally, of the pendency of a lawsuit. In an action such as this one arising under subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure, notice to class members is governed by the provisions of Rule 23 (d)(2). Rule 23(d)(2) vests the court with the sole discretionary authority to issue notice. As Rule 23 (d)(2) states, the discretionary notice is for the purpose of assuring fair conduct of an action or protecting class members—it is not for undesirable solicitation of claims. (Citations omitted.)

Lewis v. Bloomsburg Mills, Inc., 21 Fed. R. Serv. 2d 748, 750 (D.S.C. 1976). *See also Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 846 (2d Cir. 1980); *Weisman v. Darneille, supra,* at 674.

If a monitoring order is not entered, the district court cannot effectively control parties or their attorneys from sending unauthorized notices to absent class members. This problem was demonstrated in *Erhardt v. Prudential Group Inc., supra,* where the Second Circuit held that the offending party was not guilty of contempt since no order was entered limiting communications.[14] So that the clear objectives of Rule 23(d) are not frustrated, the authority of the trial court to monitor communications should be upheld.[15]

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14. The Second Circuit recommended that an order be entered limiting communications at the time the district court sends notices to class members. *Erhardt v. Prudential Group, supra,* at 846.

15. If after the monitoring order is entered, the court fails to allow critical communications to reach absent class members, the appellate courts can correct the error upon final appeal. *See Oswald v. McGarr,* 620 F.2d 1190 (7th Cir. 1980), where the court held such orders were non-appealable interlocutory orders and "any abuse of discretion may be corrected after final judgment. . . ."

C. The monitoring order entered here is appropriate.

Although the *Manual* was used by the district court in framing the present order, this case does not involve the unsupported application of the *Manual's* recommendations. In this case, the district court acted only after compiling a complete record showing the class action process was threatened by abuse.[16]

The threatened abuses in this case took place during the pre-class certification stage; the recognized stress point in this special kind of litigation. More importantly, the threatened abuses occurred at a time when the rights of unrepresented absentees were particularly exposed to misrepresentations; during an ongoing conciliation process when absent class members were making important choices concerning their rights.

In this case the facts supporting entry of the order were established in affidavits filed by the Respondents' attorneys. In these affidavits two attorneys admitted attending a meeting of potential class members called by the named plaintiffs and admitted discussing the issues

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Id. at 1195. *Accord, Weightwatchers of Philadelphia, Inc. v. Weightwatchers International, Inc., supra,* at 774. Apparently, the Fifth Circuit is in conflict with this approach, for it has granted writs of mandamus and dissolved orders limiting communications in two separate cases since deciding *Bernard, supra, (en banc). See In re Lilla Ann Norton,* 622 F.2d 917 (5th Cir. 1980); *In re Gilley,* 30 Fed. R. Serv. 2d 139 (5th Cir. 1980). This Court has rejected interlocutory appeals from orders granting or denying class status since "[t]he potential waste of judicial resources is plain." *Coopers & Lybrand v. Livesay, supra,* at 473.

16. This record included numerous briefs from the parties (J.A. 22, 47, 80, 92, 105), three affidavits from the Respondents' attorneys (J.A. 111, 115, 118), an affidavit from the EEOC (J.A. 71) and the OEO (J.A. 76), and a hearing on June 11, 1976 (J.A. 1, 3).

in the case, answering questions from the audience, and explaining the administrative and legal problems inherent in the litigation. (J.A. 115, 116, 118). Thus, the plaintiffs created and their attorneys participated in the type of activity which the *Manual's* recommended order was designed to control.[17] In addition to the statements acknowledged in affidavits, Gulf learned that Respondents' attorneys, during this meeting, also advised the potential class members not to sign conciliation releases and, if they had, to return the checks since they could recover double that amount through litigation. (J.A. 23, 24).[18]

Based upon these facts, the district court was required to enter the monitoring order to assure effective management of the class and to protect the rights of the potential class members who had already begun to feel the pressure of competing interests for their favor. Additionally, the order was required since numerous courts have recommended, indeed some have insisted upon, the trial court's supervision of individual settlement offers during a pend-

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17. *See, e.g., N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1179, where the court stated: "[I]t is the considered opinion of the court that any attempt to conduct and manage such litigation in the context of mass meetings conducted by attorneys for the parties for the purpose of discussing the status of this litigation would end in chaos."

18. This information was represented to the district court in Petitioner's Memorandum filed on May 27, 1976. (J.A. 22). Although attorneys for Respondents deny advising potential class members not to accept the offer under the conciliation agreement, counsel for Respondents make it clear in a Memorandum filed after the meeting with potential class members that they considered the relief afforded by the conciliation agreement to be inadequate. (J.A. 108, 109). The district court had the benefit of this memorandum as well as affidavits of Respondents' attorneys, Mr. Goldstein, Mr. Thibodeaux and Ms. Morrison (J.A. 111, 115, 118) prior to entering its order on June 22, 1976. (J.A. 124).

ing class action. *See In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1139-1140 (7th Cir.), *cert. denied,* 444 U.S. 870 (1979); *American Finance System, Inc. v. Harlow,* 65 F.R.D. 572, 576 (D. Md. 1974). Supervision was particularly critical in the present case "to exercise control over the communications of all parties to the suit so that undue influence [was] prevented." *Chrapliwy v. Uniroyal, Inc.,* 71 F.R.D. 461, 464 (N.D. Ind. 1976); Dole, *The Settlement of Class Actions for Damages,* 71 Colum. L. Rev. 971, 995-997 (1971); *Developments in the Law—Class Actions,* 89-B Harv. L. Rev. 1318, 1549-1550, 1601-1604 (1976).

By entering the order, the district court sought to achieve the objectives of Title VII (J.A. 126), which were articulated clearly by Justice Powell in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974):

> Cooperation and voluntary compliance were selected as the preferred means for achieving [the elimination of unlawful employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby State and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.[19]

As Justice Powell recognized, Congress charged the EEOC with meeting the objectives of Title VII. In this case, it was the EEOC (and OEO) who urged (together with

19. "[E]fforts should be made to resolve these employment rights by conciliation both before and after court action." *Dent v. St. Louis-San Francisco Railway,* 406 F.2d 399, 402 (5th Cir. 1969), *cert.*

Gulf) the resumption of the suspended conciliation efforts[20] in an affidavit (J.A. 71, 76) filed with Petitioner's memorandum. (J.A. 47).

After assuring itself that the conciliation agreement provided complete relief (J.A. 71-80), the district court granted the request to resume the conciliation process by establishing a detailed procedure under which judicial supervision of individual settlements would proceed fairly, equitably and without undue influence.[21]

When all the facts supporting entry of the order in this case[22] are weighed against the needs of Respondents and

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denied, 425 U.S. 944 (1971). *See also, United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 846-850 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

20. When served with the complaint, Gulf voluntarily suspended distribution of the back pay awards (J.A. 43, 74, 75) since many courts had held an action "must be assumed to be a class action" for purposes of dismissal or compromise under Rule 23(e) unless and until a contrary determination is made under 23(c)(1). *American Finance System, Inc. v. Harlow, supra,* quoting *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 326 (E.D. Pa. 1967).

21. The district court ordered the clerk of the court to issue a notice informing both current and former employees eligible for benefits under the conciliation agreement that they had an absolute right under Title VII to reject the terms of the conciliation agreement negotiated between the government and Gulf. (J.A. 104). *See United States v. Allegheny-Ludlum Industries, Inc., supra,* at 848 n.26. The court's notice made sure that these potential class members were fully apprised of the lawsuit, the conciliation agreement, and all relevant facts concerning their rights. (J.A. 103, 104). By allowing each potential class member entitled to relief under the conciliation agreement 45 days in which to make his decision, the court afforded them "ample opportunity to reflect and seek advice." *See Rodgers v. United States Steel Corp.*, 70 F.R.D. 639, 647 (W.D. Pa. 1976). This allowed each potential class member to knowingly and voluntarily decide whether or not to exercise his rights under Title VII. *See Alexander v. Gardner-Denver Co., supra,* at 52 n.15.

22. *See* n.16, p. 22, *infra.*

their attorneys for unsupervised communication with potential class members during the pre-certification stage of the litigation,[23] it is clear that the district court did not abuse its discretion.

II.

THE ORDER OF THE DISTRICT COURT MONITORING COMMUNICATIONS WITH POTENTIAL CLASS MEMBERS IS CONSTITUTIONAL

Having demonstrated that the monitoring order was an appropriate exercise of the district court's authority under Rule 23, the order will now be examined under the requirements of the first amendment.[24]

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23. While Respondents contend they needed to communicate with absentees to conduct discovery (J.A. 113, 116, 119), no such discovery under Fed. R. Civ. P. 26-37 was ever undertaken by them. The order did not prevent discovery, but rather it allowed "proper processing of the case," *Manual, supra,* at 34, and the order could have been "altered or amended" where justice so required. 3B J. Moore, *supra,* at 23-501. *See, e.g., N.O.W. v. Minnesota Mining and Manufacturing Co., supra,* at 1178 (order interpreted to allow witness interviews and free use of discovery rules 26-37); *Bottino v. McDonald's Corp.,* [1973-2] Trade Cases ¶ 74,810 (S.D. Fla. 1973) (local rule modified to allow discovery for preparation of position on class issues); *American Finance Systems, Inc. v. Harlow, supra,* (local rule held not prohibiting offers of individual settlements with court's supervision); *Norris v. Colonial Commercial Corp.,* 77 F.R.D. 672 (S.D. Ohio 1977) (order allowed solicitation of funds with court approval); *EEOC v. Singer Controls Co. of America,* 80 F.R.D. 76 (N.D. Ohio 1978) (order modified to allow communications likely to develop probative and relevant data).

24. When orders such as this have caused delay in judicial proceedings and resulted in confusion among the lower courts, "[i]t is all the more important, therefore, that this Court identify . . . the constitutional standard by which they are to judge . . . and the minimal procedure by which this standard is to be applied." *Gannett Co. v. DePasquale,* 443 U.S. 368, 398 (1979) (Powell, J., concurring).

A. First amendment values must be reconciled with the court's duty to protect the fair and efficient administration of justice.

There can be no doubt that first amendment concerns have a special place in our hierarchy of constitutional values. *Murdock v. Pennsylvania,* 319 U.S. 105, 115 (1943). Indeed, the constitutional value at issue here is ". . . the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut,* 302 U.S. 319, 327 (1937) (Cardozo, J.). But as this Court has regularly acknowledged, even first amendment rights must be reconciled with other important constitutional interests. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *Pell v. Procunier,* 417 U.S. 817, 822-828 (1974); *Konigsberg v. State Bar of California,* 366 U.S. 36, 49-51 (1961).

When the countervailing value to be reconciled has been the maintenance of a judicial system responsive to the needs of a free society, and to the protection of the fair and efficient administration of justice, this Court and other American tribunals have traditionally regarded that value to be most important.[25] While our political system is

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25. Thus, picketing may constitutionally be prohibited from areas around the courthouse, *see Cox v. Louisiana,* 379 U.S. 559 (1965); pre-trial communications by defendants may be limited, *United States v. Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969); the press may be required to respond to grand jury subpoenas and to answer questions, *Branzburg v. Hayes,* 408 U.S. 665 (1972); and the press may be denied access to pre-trial matters, *Gannett Co. v. DePasquale, supra.* Furthermore, this Court has suggested that orders be entered limiting pre-trial communications to protect the rights of parties, *Sheppard v. Maxwell,* 384 U.S. 333, 361 (1966); *Estes v. Texas,* 381 U.S. 532 (1965), noting that restrictions placed upon attorneys and parties are less drastic than those placed on the press. *Sheppard, supra,* at 359; *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 564 n.8 (1976); *id.* at 601, n.27, (Brennan, J., concurring).

based on the proposition that "the best test of truth" may be "the power of the thought to get itself accepted in the competition of the market . . . ," *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), our judicial system is based on the proposition that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454, 462 (1907) (Holmes, J.).[26] Thus, in our system of justice, the inherent power of the court to protect the administration of justice is undisputed. *See Sheppard v. Maxwell, supra; Pennekamp v. Florida,* 328 U.S. 331, 347 (1946); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).[27] Rooted in common law tradition, *see Bridges v. California,* 314 U.S. 252, 260 (1941), this power undoubtedly comprehends protection of the court itself, as well as parties before it. *Pennekamp v. Florida, supra,* at 347; *Zarate v. Younglove,* 86 F.R.D. 80 (C.D. Cal. 1980).[28]

Therefore, the competing constitutional values here are: (1) the court's authority to enter an order recommended by the nation's most experienced jurists and designed to

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26. *See, e.g.,* 40 U.S.C. § 13j which prohibits "loud" or "threatening" language in the Supreme Court building or on its grounds.

27. This Court has adopted a rule limiting under certain circumstances communications of its law clerks to insure the proper administration of justice. Sup. Ct. R. 7, Prohibition Against Practice.

28. This power extends to control attorneys' behavior since it is recognized "that the primary responsibility for controlling the conduct of lawyers practicing before the district court lies with that court. . . ." *Gas-A-Tron of Arizona v. Union Oil Co. of California,* 534 F.2d 1322, 1325 (9th Cir.), *cert. denied,* 429 U.S. 861 (1976). In fact, the district court's power extends to control attorneys' conduct outside the courtroom. *United States v. Hvass,* 355 U.S. 570 (1958).

insure against specific abuses of a special judicial process; and (2) the generalized first amendment concerns[29] of the parties before the court, who have submitted to the court's jurisdiction.

Part I of this argument demonstrated that the order here was required to permit the district court to manage effectively this litigation at a particular stress point and to insure misleading information did not pass from parties and their counsel to others directly affected by the litigation who depend upon the district court for their protection.[30] In the commercial area, this Court has traditionally recognized a strong governmental interest in preventing false and misleading speech. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 758-759 (1976); *Friedman v. Rogers,* 440 U.S. 1

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29. One of these concerns is that the monitoring order unconstitutionally interfered with Respondents' associational rights under the first amendment by preventing solicitation. It is true this Court has allowed solicitation when undertaken to express political beliefs and associational freedoms. *In re Primus,* 436 U.S. 412 (1978). The *Primus* case relied heavily for its support on *NAACP v. Button,* 371 U.S. 415 (1963), a case which allowed attorneys to solicit for the purpose of furthering the civil rights objectives of the organization and its members. *Button* has been interpreted by this Court as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576, 585 (1971). *See also Bates v. State Bar of Arizona,* 433 U.S. 350, 376 n.32 (1977). The order here did not interfere with any constitutional right of access to the courts since the order was entered during ongoing litigation to manage a complicated class action case that had begun to feel the pressures of abuse.

30. In restricting outside influences, the courts have recognized that the right to a fair trial both in civil and criminal cases is one of our most cherished values and that a trial judge should "have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity." *See CBS v. Young,* 522 F.2d 234, 241 (6th Cir. 1975).

(1979).[31] How much stronger should that concern be when the communication originates, in a very real sense, in the district court itself,[32] and when those desiring to communicate the speech are, at least to some degree, doing so as officers of the court?[33] *See Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975). This question was answered to a great extent in *United States Civil Service Commsision v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973), where this Court sustained restrictions on the freedom of political expression of government employees. In doing so, it noted that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general'." *Id.* at 564. Similarly,

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31. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide open' debate. . . ." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), quoting *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964).

32. In *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969), this Court emphasized that the fiduciary role of those who sought to communicate on the public air medium permitted the imposition on speech of restrictions which otherwise would be impermissible. Those who use the medium of their role in federal litigation as a method of communication can certainly be held to the same obligation.

33. "As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Nebraska Press Ass'n v. Stuart, supra,* at 601, n.27 (Brennan, J., concurring). The same rationale must apply to parties since having submitted to the jurisdiction of the court, they have implicitly agreed to comply with the court's attempt to administer justice properly. *Cf. Snepp v. United States,* 444 U.S. 507 (1980). Absent class members have a right to expect protection by the court and, in absence of this protection, this Court has granted them special rights to protect themselves. *See United Airlines, Inc. v. McDonald,* 432 U.S. 385 (1977) (where this Court said the district court may have a responsibility to allow an absent class member to intervene to appeal the denial of class certification).

in this case, the district court has an interest, indeed an obligation, to monitor the conduct of the attorneys and of the parties who are conducting litigation before the court. As in the case of the statute in *Letter Carriers,* the order here discriminates "against no racial, ethnic, or religious minorities. Nor [does it] seek to control political opinions or beliefs. . . ." *Id.* at 564. In *Letter Carriers,* the Court also ruled "that it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative government is not to be eroded to a disastrous extent." *Id.* at 565. Similarly, the district court here had a legitimate constitutionally based concern in ensuring that this class action was conducted in a manner which not only avoided injustice but the appearance of injustice.

B. The order entered in this case is not a prior restraint.

In reconciling the competing constitutional values of freedom of speech and fairness to the litigant on the one hand and the effective administration of justice in the federal judicial system on the other, there is a great temptation to "pigeonhole" this order into one of the classical modes of first amendment analysis. First amendment questions should not be analyzed by forcing them into rigid preconceived categories. On the contrary, this Court has required a careful balancing of the competing constitutional interests. *See, e.g., Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979). Thus, while it would not automatically be fatal, *Times Film Corp. v. Chicago,* 365 U.S. 43, 47-49 (1961), affixing the "prior restraint" label would expedite reaching a pre-packaged result since such a label carries with it a "heavy presump-

tion" against its validity. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 545 (1976), citing *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971). Yet, such an approach would hardly recognize the careful functional analysis which Justice Frankfurter emphasized was so important if the result is to reflect a true reconciliation of competing constitutional concerns. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441 (1957). When the approach suggested by Justice Frankfurter is followed, this order is not a prior restraint of first amendment rights. The order here neither placed an "absolute ban on access," *Gannett Co. v. DePasquale, supra,* at 393, nor "restrained publication of, or comment upon, information, . . ." *Id.* at 411 (Blackmun, J., concurring in part and dissenting in part), for it allowed free exercise of speech without prior court approval. Moreover, the order operated in an even-handed way on all parties[34] and was not aimed at any particular group or ideology.[35]

In examining the present order, it becomes immediately apparent that this is an especially inappropriate case in which to rely upon the "talismanic test" of "prior restraint," *Kingsley Books, Inc. v. Brown, supra,* at 441, since under the order in question a broad "exception" exists allowing all constitutionally protected communications without prior approval of the district court.

This exception, as a practical matter, limits severely the scope of the information subject to prior scrutiny. Under

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34. The order did allow resumption of the conciliation process under the court's supervision. (J.A. 125).

35. *Cf. United States Civil Service Commission v. National Ass'n of Letter Carriers, supra,* at 564 where this Court noted "[t]he restrictions so far imposed . . . are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described."

this exception, all expressions assertedly protected by the first amendment may be made by the parties or their counsel free of prior restraint. *See Waldo v. Lakeshore Estates, Inc., supra,* at 789. Indeed, the exception is preserved in the instant order even though, for example, the party or attorney may assert the constitutional right to solicit legal representation of potential class members. [An activity specifically prohibited by ¶ 2 of the order (J.A. 124).] In a contempt proceeding to punish such solicitations, the test would be the applicable constitutional test for solicitation in effect at the time the violation is charged. Presently, this would require an analysis by the court of whether the solicitation was commercial, under the standards of *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978) or whether the solicitation was a form of political expression under the standard of *In re Primus, supra.* Thus, the order's exception allows any court imposed prohibition on speech to be constitutionally challenged by the one charged with its violation[36] and then only after all the safeguards of the criminal justice system are fulfilled.[37] For that reason the inquiry

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36. *See United States v. Ryan,* 402 U.S. 530 (1971) where a party was served with a subpoena and upon appeal of the denial to quash, this Court held the party must either obey the subpoena or refuse to do so and contest its validity during the contempt proceeding. *Accord, Cobbledick v. United States,* 309 U.S. 323 (1940); *Thomas v. Collins,* 323 U.S. 516 (1945); *Union Tool Co. v. Wilson,* 259 U.S. 107, 110-111 (1922). *See also In re Halkin,* 598 F.2d 176, 199 (D.D.C. 1979); *Chicago Council of Lawyers v. Bauer, supra. Contra, United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979 (1973). *Walker v. Birmingham,* 388 U.S. 307 (1967), was distinguished in *Ryan* on the basis that the party charged with contempt did not avail himself of earlier review of the underlying order. *United States v. Ryan, supra,* at 532 n.4.

37. Violations of the order would be punished by criminal contempt since the objective would be to vindicate the authority of the court. *See Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911),

into the order's validity cannot proceed on the basis of its assumed constitutional infirmity as a "prior restraint." *See Waldo v. Lakeshore Estates, Inc., supra* at 789; *cf. Vance v. Universal Amusement Co.*, 445 U.S. 308, 320 (1980) (White, J., dissenting).

In addition, the order does not unduly "chill" first amendment rights since the one charged with its violation can challenge the constitutionality of any prohibition on speech during appeal of the contempt conviction. *See United States v. Ryan, supra,* discussed in n.36, *infra.*

C. The facts in this case support entry of the order based on any of the previously articulated standards.

Having shown the "self-wielding sword" of "prior restraint"[38] to be a particularly inappropriate standard by which to judge the order, this Court must articulate the governing standard for all district courts faced with the reconciliation of constitutional values placed in competing

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where this Court said: "[i]f it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *See also Shillitani v. United States,* 384 U.S. 364, 370 (1966). When charged with contempt a party is entitled to the notice requirements of Fed. R. Crim. P. 42(b); to counsel, *In re Oliver,* 333 U.S. 257, 275 (1948); to trial by jury in serious cases, *Bloom v. Illinois,* 391 U.S. 194, 211 (1968); and to have the charges proven beyond a reasonable doubt. *Michaelson v. United States,* 266 U.S. 42, 66 (1924). Further, there must be proof of criminal intent to violate the order of the court. *United States v. Marx,* 553 F.2d 874, 876 (4th Cir. 1977). Whether a criminal contempt is "serious" depends on the size of the fine and the length of the incarceration. In *Cheff v. Schnackenberg,* 384 U.S. 373 (1966), the Court held that imprisonment for a period of six months for criminal contempt was punishment for a petty offense and therefore no jury trial was required.

38. *Kingsley Books, Inc. v. Brown, supra* at 441.

roles by entry of the order. Several standards have been suggested in earlier cases and by the Board of Editors of the *Manual.*

The Board of Editors, on the basis of their broad experience in the administration of justice in the class action context, have taken the position that the very nature of the unique class action device creates sufficient justification for entry of the order.[39] *Manual, supra.* The Board of Editors rejected the requirement that a "real" or "set" abuse of the policies behind Rule 23 must occur before a court could enter their proposed order. *Id.* It took this position because the types of communication which hold the potential for abuse are so numerous and unpredictable they defy "exhaustive definitions." *Id. See Waldo v. Lakeshore Estates, Inc., supra,*

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39. Even if this Court chooses to articulate a more exacting standard for the entry of such an order, the observations of the editors of the *Manual* are nevertheless very relevant with respect to any contention that the order is overbroad or vague. With respect to overbreadth, this Court noted in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), that "[a]pplication of the overbreadth doctrine . . . is, manifestly, strong medicine" and ought to be "employed by the court sparingly and only as a last resort." *Id.* at 613. Here, the order is not "directed at particular groups or viewpoints," *id.* at 616, but seeks to regulate, "in an even-handed and neutral manner," *id.*, the conduct of those engaged in litigation before the court. It describes the forbidden conduct as precisely and as narrowly as the nature of the litigation situation permits. As this Court noted in *Broadrick,* "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statutes' plainly legitimate sweep." *Id.* at 615. With respect to vagueness, the order in question does not require attorneys in civil litigation or clients acting under their advice to "guess at its meaning," *id.* at 607, quoting *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). The order only prohibits "easily identifiable and constitutionally prescribable" conduct. *United States Civil Service Commission v. National Ass'n of Letter Carriers, supra,* at 581.

at 789-791. The Board of Editors recommended the proposed order not be changed, even though some commentators and courts have indicated their dissatisfaction. *Manual, supra,* (Cumm. Supp.).[40]

On the other hand, some courts have required a showing of "reasonable probability" of prejudice to the fair administration of justice before restrictive orders could be entered. *United States v. Tijerina,* 412 F.2d 661, 666-667 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969);[41] *See also Hirschkop v. Snead,* 594 F.2d 356 (4th Cir. 1979); *Younger v. Smith,* 30 Cal. App. 3d 138; 106 Cal. Rptr. 225 (Ct. App. 1973). Still other courts would require a showing of "serious and imminent" danger to the administration of justice before entering the order. *See Chicago Council of Lawyers v. Bauer, supra; Rodgers v. United States Steel Corp.,* 536 F.2d 1001 (3d Cir. 1976).

The facts in this case established threats of abuse to the class action device sufficient to justify entry of the order based upon any of the standards articulated. The very nature and intensity of the competing forces which

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40. *See* n.11, p. 18, *infra.*

41. The court in *Tijerina* adopted the "reasonable likelihood" standard and specifically rejected the application of the "clear and present danger test" raised in *Bridges v. California,* 314 U.S. 252 (1941) and applied in *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Craig v. Harney,* 331 U.S. 367 (1947); and *Wood v. Georgia,* 370 U.S. 375 (1962). In so doing, the court noted that none of the above decisions dealt with a situation where a contempt arose from the violation of an order; rather, all these cases concerned extrajudicial statements which, in the absence of a prohibitive order, were said to obstruct the administration of justice. *United States v. Tijerina, supra,* at 666. It was recognized that "[t]he Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial." *Id. See also Sheppard v. Maxwell, supra,* at 363.

occurred at the unusually delicate stage of this litigation demanded entry of the order. These forces, in fact, threatened the rights of potential class members and challenged the class management ability of the district court. As guardian of the absentees' rights and as administrator of the unique class action process, the district court fulfilled its duty to actively monitor the actions of the parties —a duty imposed by the decisions of this Court.

CONCLUSION

Therefore, the decision of the United States Court of Appeals for the Fifth Circuit invalidating the order monitoring communications should be reversed, and the district court's order should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 1981, a true and correct copy of the foregoing Brief for the Petitioners and Joint Appendix were deposited in the United States Post Office with first class postage prepaid and properly addressed to the following parties to this action and others required to be served:

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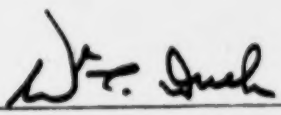

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